IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO. 1322 OF 2002

IN

PETITION NO. 1030 OF 1997

Mrs. Clara D'Souza . .. Petitioner.

vs.

M/s. Suraj Estate Developers

Pvt. Ltd., & Ors. .. Respondents.

Mr. S.M. Shettigar for petitioner.

Mr. R.C. Shah with V. Datta i/by M. Gandhi & Co. for respondents.

CORAM : S.U. KAMDAR, J.

DATE : 2nd August, 2005.

ORAL JUDGMENT :

. The present notice of motion has been taken out for a declaration that the petitioner being the sole executrix and beneficiary of the will dated 15.2.1990 of the deceased Mrs. Anna Clara Meares is entitled to possession of the flat being residential premises admeasuring about 180 sq. fts. (carpet area) situated at 463, Marinagar, Final Plot No. 557 of Town Planning Scheme, Bombay City No. III,

M.M. Chotani Road, Mahim, Mumbai 400 016.

2. Some of the material facts of the present case, briefly enumerated are as under :-

3. One Mrs. Anna Clara Meares expired leaving behind her Will and Testament dated 15.2.1990. She died on 10.3.1996. In the said will and testament dated 15.2.1990, the petitioner herein is the sole executrix and the beneficiary of the said properties of the deceased. The said petitioner filed a probate Petition being Petition No. 1030 of 1997 in respect of the said will and testament dated 15.2.1990 and on 8.6.1999 this Court granted probate in favour of the petitioner herein. One of the properties in the said will was known as "Quinny House" situated at 463, Marianagar, M.M. Chotani Road, Mahim, Bombay - 400 016. The said structure admeasuring about 342 sq. fts (carpet area) was the subject matter of the said will.

4. On 14.5.1993 i.e. during the life time of the said deceased, the deceased entered into an agreement with the respondent no. 1 i.e. the builder and the respondent no. 2 i.e. the owner of the land, viz., St. Michael Church. The deceased was having a structure on the plot of land belonging to respondent no. 2. However the petitioner was an

owner of the structure though the tenant of the land. Under a tripartite agreement the said deceased agreed to hand over and surrender a peaceful and vacant possession of the premises in her possession for redevelopment by the 2nd respondent herein and in consideration thereof, the 2nd respondent agreed to provide to the occupant what is known as on ownership basis a permanent accommodation of self-contained flat with carpet area of 180 sq. fts. It was also agreed that in respect of the balance of the area which has been surrendered by the petitioner being original area of 342 sq. fts, the petitioner will get a sum of Rs. 7 lacs as and by way of compensation from the respondent no. 1. The tripartite agreement dated 14.5.1993 is in writing and is admittedly executed by and between the said deceased and the respondent no. 1. It is the case of the petitioner that even though such building has already ben constructed and occupation certificate has been obtained by respondent no. 1, the respondent no. 1 failed to give possession of the said flat and thus, the petitioner has taken out the present notice of motion for a direction to the respondent no. 1 to hand over the possession of the said premises admeasuring 180 sq. fts. and the amount of Rs. 7 lacs as mentioned in the said agreement and also mentioned in probate petition dated 8.6.1999.

5. The respondent no. 1 has resisted the aforesaid motion. The respondent no. 1 has filed an affidavit dated 23.6.2005. In the said affidavit it has been inter alia contended that the present notice of motion is not maintainable as it seeks the specific performance of the agreement dated 14.5.1993 between the respondents and the deceased Ms. Anna Clara Mears and thus such a dispute is being outside the jurisdiction of the probate court or testamentary jurisdiction of this Court this court can not grant any relief. It has been further contended that the petitioner should file a civil suit for the reliefs sought in the present notice of motion.

6. In so far as the merits of the present motion is concerned, it has been admitted that St. Michael's Church was the owner of the said plot of land. It is also admitted that "Quinny House" which was standing on the property belonging to the said Church and was occupied by the family members. It is also admitted that one of the premises thereon was occupied by deceased Mrs. Anna Carla Meares who was the sister of Osbern Quinny. It is also admitted that the said deceased was also owner and occupant thereof. It is also admitted that she was the owner of the structure (Yeola Mali) therein. It is also an admitted position that respondent no. 1 being the developer of the said property entered

into an agreement with the deceased and the agreement which is annexed as Exhibit "B" to the affidavit in support of the motion has been executed.

7. It is however, the case of the respondent no. 1 that the said deceased made false representation in clause 12 of the said agreement wherein she has stated that there is no suit pending in respect of her rights in the said property because according to the respondent no. 1 R.A.D. Sit No. 2911 of 1986 was pending which was filed by one Mr. Narayan N. Kudal against the deceased and other co-owners of the said Quinny House inter alia claiming that the said Kudal was a tenant in respect of the said premises which the deceased has claimed as her own. It has been further admitted that said R.A.D. Suit has been pending in that Court. During the pendency of the said suit, Mrs. Anna Clara Mears has expired and the said Kudal in that suit moved an application No. 5223 of 1996 for joining the legal heirs and ultimately Narayan N. Kudal has joined the respondent no. 1 to the said suit. The respondent no. 1 came on record as a successor in title in the said property and it is his case that the said R.A.D. suit was decreed by an order and judgment dated 12.2.2004 in favour of said Kudal. It is his further case that against the same he filed an appeal being Appeal NO. 500 of 2004 and in

the appeal he has entered into consent terms dated 16.8.2004. By the said consent terms he supposed to have acquired the right title and interest of the said Kudal. The said payment is made by respondent no. 1 to Kudal in substitution of the right of Anna Clara Meares and the said clauses 4, 5 and 6 of the said consent terms read as under :-

> 4. The Respondents state that however they have agreed to accept an amount of Rs. 4,51,000/- (Rupees Four lakhs fifty one thousand only) by Pay Order NO. 060502 dated 24.07.2004) drawn on UTI Bank in favour of Rajesh Kudal, the Respondent No. 2, in lieu of the permanent alternate accommodation reserved by the Appellants as aforesaid.
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> 5. The Respondent Nos. 2 to 6 state that they have no right, title and interest whatsoever nature in respect of their tenancy rights in the suit premises so also in the permanent alternate accommodations reserved by the Appellants in the newly constructed building as aforesaid.
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> 6. The Appellants do hereby agree and

undertake to pay to the Respondents a sum of Rs. 4,51,000/- (Rupees Four lakhs fifty one thousand only) by Pay Order No.060502 dated 24.07.2004 drawn on UTI Bank in favour of Rajesh Kudal, the Respondent No. 2, in lieu of allotting and handing over the Respondents the alternate accommodation reserved by the Appellants as aforesaid, receipt whereof, the respondents do hereby admit & acknowledge."

8. It is his case that pursuant to the order passed in the said consent terms, he has become the owner of the said premises and the petitioner herein who is the sole beneficiary of the said estate of Anna Mary Mears is not entitled to the possession of the flat as contemplated in the agreements and similarly petitioner is not entitled to the payment of Rs. 7 lacs also. On the aforesaid basis, the present notice of motion has been resisted.

9. The learned counsel appearing for the respondent no. 1 has contended that the present motion is not maintainable on two grounds.

Firstly, it has been contended that the petition for probate having been disposed of motion no. 1322 of 2002 could not have been taken out in the said testamentary petition which is already disposed of. Secondly, it has been contended that in any event, this Court do not decide the title dispute in the present proceedings and, therefore, this Court has no jurisdiction to entertain the present motion or grant any relief.

10. In my opinion, both the aforesaid contentions are misconceived and without any merit. Firstly, even if probate petition is disposed of, there is no prohibition that a further direction cannot be obtained by way of notice of motion. Even in a disposed of matter if further directions are necessary the proceedings are permissible by way of an application. It is not that the present motion is seeking any inter-locutary reliefs pending the petition. By the present notice of motion, the petitioner is seeking directions in consequence of issuance of the probation petition in their favour and thus, in my opinion, motion is maintainable and necessary directions can be passed. However, as far as the second contention is concerned, i.e. issue as to the title of the said premises cannot be determined in testamentary jurisdiction, I am of the opinion that it is true that the testamentary jurisdiction is limited and

cannot determine or decide disputes as to the title of various properties. However, in the present case, in my opinion, certain directions and orders are required to be passed in view of the peculiar situation existing in the present case. The peculiar situation in the present case is that admittedly Anna Clara Mears was a party to the suit which was filed in the Small Causes Court. As a normal rule and normal course on death of such a person the legal heirs of such a person were required to be added as a party defendant to the said suit. Instead of the legal heirs being added in that suit, the respondent no. 1 got himself impleaded as a party as a successor in title of the property without disclosing to the Court that in fact in the tripartite agreement the rights are also reserved in favour of the said deceased Anna Clara Mears and, therefore, her legal heirs and legal representatives are necessary and proper parties. It is not only that, after the suit has failed, the respondent no. 1 has purportedly entered into a consent terms by which rights of the deceased which have ben in fact vested in the petitioner by virtue of the will which is probated has been purportedly given up by the respondent no. 1 and so also agreement is entered into by which the respondent no. 1 has declared himself as the purchaser of the property by making certain payments to the

said Kudal who was claiming tenancy in respect of the property. I am of the prima facie opinion that the manner in which the proceedings before the Small Causes Court is conducted without bringing legal heirs of the said deceased as party to the said proceedings who are entitled to the estate under the will the respondent no. 1 has in collusion with the said Kudal who was claiming tenancy in the said properties have committed fraud and abuse of the process of law to acquire so called title as owner in respect of the said flat. In my opinion, the respondent no. who is the builder and being aware of the facts ought not to have and could not have entered into such surreptitious arrangement by which rights of the deceased Anna Clara Mears which is now vested in the petitioner and the legal heirs of the deceased could have been parted with. In my opinion conduct of the respondent no. 1 is frivolous and thus it is necessary that though I must direct the petitioner to file an appropriate proceedings in a court of appropriate court till that time certain orders are required to be passed so as to protect the rights of the petitioner which can ultimately be adjudicated by a Civil Court.

11. In the aforesaid circumstances, I pass the following order :-

That the Court Receiver, High Court, Bombay is appointed as Receiver in respect of the said flat being residential premises admeasuring about 180 sq. fts. (carpet area) situated at 463, Marinagar, Final Plot No. 557 of Town Planning Scheme, Bombay City No. III, M.M. Chotani Road, Mahim, Mumbai 400 016, with the direction to take, recover physical possession thereof since the respondent no.1 is prima facie claiming rights therein fraudulently and is not entitled to continue to occupy and possess the said flat. The Receiver will keep the said possession with him for a period of two months within which the petitioner will be at liberty to approach the Civil Court for adjudication of the various disputes raised in the present motion for its appropriate adjudication. If the petitioner fails to obtain appropriate orders from the Civil Court within the aforesaid period, the Receiver to seek directions from the Court in respect of the said flat and abide by the directions issued by the Court in that behalf.

12. Motion disposed of accordingly. However,

there shall be no order as to costs.

13. The learned counsel appearing for the respondents to the motion applies for stay of the order. Application is rejected.